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CITATIONS

275823—40

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 534

W. J. RAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Judge relating to the question involved herein, which he rendered in connection with the denial of petitioner's motion for a new trial, appears at R. 303–305. The opinion of the Circuit Court of Appeals (R. 309–319) is reported in 114 F. (2d) 508.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered September 23, 1940 (R. 320), and a petition for rehearing (R. 320–322) was denied October 15, 1940 (R. 322). The petition for a writ

of certiorari was filed October 29, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether, under the circumstances of the case, reversible error resulted because of a communication between the trial judge and the jury subsequent to the submission of the case to the latter, such communication not having been made in open court or in the presence of petitioner or his counsel.

STATEMENT

The petitioner was convicted (R. 89) in the District Court for the District of North Dakota under counts two through thirty-two of an indictment (R. 11–87) charging him with violating Section 5209, Revised Statutes, as amended (U. S. C., Supp. V, Title 12, Sec. 592), by aiding and abetting an officer of a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, wilfully to misapply the funds and credits of such bank.[1] The jury accompanied the verdict of guilty with a recommendation of leniency (R. 89). Petitioner was sentenced to imprisonment for a period of three years on each count, to run concurrently

[1] The first count of the indictment (R. 2–10), charging a conspiracy to violate Section 5209, Revised Statutes, as amended, was dismissed by the court (R. 90).

(R. 90), and on appeal the Circuit Court of Appeals for the Eighth Circuit unanimously affirmed the judgment of conviction (R. 309–320) and denied rehearing (R. 322).

The only question presented to this Court deals with a communication between the trial judge and the jury, made subsequent to the submission of the case but not in open court or in the presence of the petitioner or his counsel. The facts pertaining to this question are as follows: After an appeal had been taken, petitioner filed in the Circuit Court of Appeals a motion to include in the record certain affidavits of jurors. The motion was denied, but in its order the Circuit Court of Appeals stated that it appeared that more than five days after trial, the petitioner had moved for a new trial on the ground of a newly discovered procedural irregularity, but was prevented from presenting the motion and supporting affidavits to the trial court through no fault of his own, the trial judge having been absent from the district. The Circuit Court of Appeals ordered that the appeal should remain pending; that the petitioner be permitted to present the motion for a new trial and supporting affidavits to the District Court; and that the latter should hear the motion, take appropriate action thereon, and certify such proceedings to the Circuit Court of Appeals in a supplemental record (R. 289–292).

Thereafter the petitioner moved in the District Court to vacate the judgment of conviction and for a new trial on the ground that an improper com-

munication was had with the jury in the absence of petitioner and his attorney (R. 292–293). In support of this motion, petitioner submitted affidavits of three jurors (R. 293–296). These affidavits stated that after the jury had deliberated for about twenty-three hours, they advised the bailiff that they desired to be informed whether the judge would consider a recommendation of leniency; that thereafter a deputy marshal entered the jury room and told them that the judge would permit such a recommendation and consider and act on the same; and that affiants believed that by recommending leniency, a light sentence would be imposed.

In opposition to the motion, the Government submitted affidavits of the deputy marshal and three other jurors. The deputy marshal averred that he was told by the bailiff that the jury wanted to know if it was possible for them to recommend leniency; that he entered the jury room and was asked such question; that he informed the jury that he could not tell them whether such recommendation would be proper, but would present their question to the judge if they so desired; that upon the request of the jury he went to the judge and was informed that the jury could recommend leniency, but the recommendation should be on a separate paper rather than on the verdict form; that affiant thereupon conveyed this information to the jury; that at no time while he was in the jury room was there any discussion of the case; and that the judge did not state nor did affiant inform the jury that such

recommendation would be acted upon by the judge (R. 297–298). Two of the jurors stated that the question of recommending leniency was considered by the jury after they had agreed upon a verdict of guilty; that one of the jurors requested the bailiff to ascertain from the judge if they might recommend leniency; that thereafter the deputy marshal informed them that he had seen the judge and such recommendation was permissible, whereupon they made the recommendation and attached it to the verdict (R. 298–299). The third juror recited the same facts in more detail. He stated that after due consideration the jury unanimously agreed upon a verdict of guilty; that thereafter, because of doubt as to whether they might properly recommend clemency, they called in the deputy marshal and asked whether such a recommendation would offend the judge; that the deputy marshal did not think the judge would be offended, but offered to communicate with him and find out; and that shortly thereafter the deputy marshal returned and informed the jury that he had discussed the matter with the judge and that the latter would not be offended by a recommendation of clemency (R. 299–300).

The motion for a new trial was heard and denied (R. 302–303). In a memorandum opinion (R. 303–305) the District Court stated, *inter alia,* that it was not claimed in any of the affidavits presented by the petitioner that the communication with the jury occurred prior to the time the jury had agreed

upon its verdict but that on the contrary from the affidavits submitted by the Government "it affirmatively and conclusively appears that at the time some of the jury inquired of the Deputy Marshal as to whether the Judge would be offended if the jury should recommend leniency for the defendant the jury had, in fact, agreed upon its verdict of guilty. That being true, the jury had completely and finally concluded all of its deliberations pertinent to its duties and functions as a jury. Its only unfinished duty as a jury was to formally return its verdict into Court that the same might be read and recorded." While the court for these reasons thought that the communication was not improper, it concluded its opinion by holding that even if it be assumed that it was improper, "it seems clear that it must have been without prejudice to the defendant."

After stating that it is improper for a trial judge to hold any important communication with the jury unless it is done openly and with opportunity to the accused and his counsel to be present, the Circuit Court of Appeals held that the petitioner was not prejudiced by the communication in question since the record affirmatively showed that a verdict had been reached by the jury before the communication occurred and that "the verdict was not conditional on the opportunity of the jury to recommend leniency or any promise by the court

that such recommendation would be followed" (R. 318–319).[2]

ARGUMENT

The petitioner does not question that the Circuit Court of Appeals correctly determined that the record affirmatively showed that he was not prejudiced by the communication involved. He contends in effect that such communication was *per se* reversible error, with the result that the Circuit Court of Appeals was without power to inquire into whether the petitioner was actually prejudiced by the communication.

We submit that the Circuit Court of Appeals properly gave consideration to the question whether the communication was prejudicial in determining if reversible error was committed.

It has been recognized in a number of cases involving analogous communications that a reversal is not required if it affirmatively appears that there was no prejudice. *Ah Fook Chang* v. *United States,* 91 F. (2d) 805, 809–810 (C. C. A. 9th);

[2] While both the District Court (R. 304) and the Circuit Court of Appeals (R. 318) stated that petitioner's motion for a new trial was not based on "newly discovered evidence," within the meaning of Rule II, paragraph 3, of the Criminal Appeals Rules promulgated by this Court, the Circuit Court of Appeals nevertheless considered the question presented by the motion for the reason that "the record reveals an irregularity that deserves attention" (R. 318). For the same reason the Government does not urge that the Circuit Court of Appeals had no power to review the question.

Outlaw v. *United States,* 81 F. (2d) 805, 808–809 (C. C. A. 5th), certiorari denied, 298 U. S. 665; *Little* v. *United States,* 73 F. (2d) 861, 866–867 (C. C. A. 10th); *Sandusky Cement Co.* v. *A. R. Hamilton & Co.,* 287 Fed. 609, 611–612 (C. C. A. 6th), certiorari denied, 262 U. S. 759; *Dodge* v. *United States,* 258 Fed. 300, 303–305 (C. C. A. 2d), certiorari denied, 250 U. S. 660.

Even if it be assumed that such a communication has relation to the substantial rights of a defendant, and hence is not within the purview of Section 269 of the Judicial Code as amended (U. S. C., Title 28, Sec. 391), requiring the courts to disregard technical errors, defects or exceptions which do not affect the substantial rights of the parties,[3] it is settled that a reversal is not required where it affirmatively appears from the record that the error is harmless. *McCandless* v. *United States,* 298 U. S. 342, 347–348, and cases cited.

Neither *Fillippon* v. *Albion Vein Slate Co.,* 250 U. S. 76, nor *Shields* v. *United States,* 273 U. S. 583, cited by the petitioner, establishes a contrary rule. Indeed, in the *Fillippon* case, which involved a supplementary instruction given to the jury in the

[3] Section 269, as amended, so far as pertinent, reads: "* * * On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." See *Berger* v. *United States,* 295 U. S. 78, 82.

absence of the parties and their counsel, the Court expressly recognized that error in the course of trial does not furnish ground for reversal where it affirmatively appears that it is harmless. The Court held, however, that the instruction in question, so far from being harmless, "was erroneous and calculated to mislead the jury" (p. 82). In the *Shields* case the Government did not contend that the communication was harmless and there was no finding, as here, that the record affirmatively showed it to be nonprejudicial. Moreover, it would appear from the facts recited in the opinion in that case that the trial judge's communication may well have caused the jury to return a verdict of guilty as to Shields when otherwise the jury would have disagreed.

CONCLUSION

The case was correctly decided by the Circuit Court of Appeals and there is involved no conflict of decisions. We therefore respectfully submit that the petition for writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.

NOVEMBER 1940.

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